

DOCUMENT RESUME

03298 - [A2293423]

[Protest against the Award of a Cost-Plus-Award-Fee Contract].  
B-199542. August 16, 1977. 9 pp.

Decision re: Rockwell International Corp.; by Robert F. Keller,  
Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel; Procurement Law II.

Budget Function: General Government: Other General Government  
(906).

Organization Concerned: Environmental Protection Agency; Xonics,  
Inc.

Authority: F.P.R. 1-3.805-1(b). 55 Comp. Gen. 244. 55 Comp. Gen.  
247. 54 Comp. Gen. 612. 54 Comp. Gen. 614-5. 54 Comp. Gen.  
783. B-187892 (1977). B-182566 (1975). B-178220 (1973).  
B-181170 (1974).

The protester objected to the manner in which a cost-plus-award-fee contract was awarded. The call for a new round of best and final offers, as a result of various material changes made to the specification requirements after submission of best and final offers, was justified and did not constitute an auction technique. The record indicates that the price revisions made under the second round of best and final offers were primarily the result of changed requirements and correction of proposal deficiencies. The costs of phasing in a new contractor may be an evaluation factor, but only if the solicitation so provides. The determinations of proposal merits are a matter of agency discretion and will not be disturbed unless demonstrated to be arbitrary or unreasonable. (Author/SC)

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*J. Rotopoulos*  
*Rev II*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**DECISION**

FILE: B-188542

DATE: August 16, 1977

MATTER OF: Rockwell International Corporation

**DIGEST:**

1. Call for new round of best and final offers, as result of various material changes made to specification requirements after submission of best and final offers, is justified and does not constitute auction technique. Agency had no alternative but to institute a second round of negotiations. Moreover, record indicates that price revisions made under second best and final offers were primarily result of changed requirements and correction of proposal deficiencies.
2. Costs of phasing in new contractor may be evaluation factor where considered desirable to do so but only if solicitation so provides.
3. Determinations of proposal merits are matter of agency discretion which will not be disturbed unless demonstrated to be arbitrary or unreasonable, and instant record fails to provide evidence of objectionable evaluation.

Rockwell International Corporation (Rockwell) protests the manner in which a cost-plus-award-fee contract was awarded to Xonics, Incorporated (Xonics). The award was made by the Environmental Protection Agency (EPA) under request for proposals (RFP) DU-76-11079 for the operation and maintenance of the CHAMP (Community Health Air Monitoring Program) air monitoring system, operated by the Health Effects Research Laboratory, Research Triangle Park, North Carolina.

Rockwell's primary contention is that EPA personnel engaged in a prohibited "auction technique" and conferred an unfair competitive advantage on Xonics when, after best and final offers had been received and EPA had tentatively selected Rockwell for final negotiations and had advised Xonics that the selection was based on Rockwell's superiority in technical merit and lower cost, EPA reopened negotiations and requested an additional round of best and final offers.

Rockwell charges that the effect of the revelation that its proposal was superior from the standpoint of technical merit and lower cost was to advise Xonics that to win the procurement it had to make major technical improvements in its proposal and to substantially lower its costs. On the other hand, Rockwell contends it did not know what Xonics had been told, and therefore did not take steps to trim costs which it might have done had it known of the disclosure to Xonics. Rockwell further charges that Xonics was advised by EPA as to EPA's reservations about Rockwell's costs and, by implication, where Xonics' proposal could be strengthened to compare more favorably with Rockwell's, whereas Rockwell was not advised of EPA's concern until the announcement of the intended award to Xonics.

In addition, Rockwell charges that EPA's conversations with Xonics resulted in a "leveling" or "technical transfusion" of concepts unique to Rockwell's proposal, and that inadequate security measures may have compromised the confidentiality of Rockwell's proposal.

Rockwell alleges that as a direct result of the foregoing, Xonics' technical score was elevated from a score of 763 after the first best and final offer to 804 after the second, compared to Rockwell's 854, while Xonics' cost proposal, initially higher than Rockwell's, became lower after second best and final offers.

Accordingly, Rockwell charges EPA with a violation of the auction technique prohibition of Federal Procurement Regulations (FPR) § 1-3.805-1(b) (1964 ed.) which holds that an offeror may not be informed that his price is not low in relation to another offeror's. Citing decisions of this Office, Rockwell argues that the improper disclosure of information in proposals should be remedied by either award on the basis of initial best and final offers or, in the alternative, through a third round of best and final offers with information equalized between the respective offerors.

Rockwell further contends that in the evaluation of respective cost proposals, EPA failed to consider an alleged \$645,775 that would be incurred in close-out and transition costs in replacing Rockwell (the incumbent contractor), which would render Rockwell's second best and final offer less expensive than Xonics'.

Finally, Rockwell takes exception to EPA's evaluation of its past performance, contending that its past performance and management approach should have received more favorable consideration; and that the contracting officer accepted unsupported allegations concerning past performance problems as an important factor in deciding not to make an award to Rockwell.

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By way of background, the RFP was issued August 13, 1976, calling for the operation of the central control station, 23 fixed stations, and 5 mobile stations. It was contemplated that the contractor would be required to operate an average of 25 stations daily.

Only two proposals were received on October 4, 1976, in response to the solicitation. After written and oral discussions were conducted with both offerors, Rockwell and Xonics received respective technical scores of 829 and 763, resulting in a rating of technical acceptability for each. Rockwell's total proposed cost was \$4,459,150 compared to Xonics' \$5,920,616. The cost evaluation concluded that while the Rockwell proposal was tightly estimated, the system could be effectively operated at the amount proposed. Accordingly, it was determined on December 7, 1976, that Rockwell should be selected for final negotiations.

However, it was then found that the manhours Rockwell proposed were not adequate for the mobiles in addition to the fixed stations and the initial evaluation had mistakenly assumed that additional manhours were included in the Rockwell proposal for the mobile stations. As a result, 2.5 manyears were added to Rockwell's proposal for the mobile stations. Since Xonics had proposed 5 manyears for that purpose, its mobile station manning estimate was halved to put both offerors on the same footing. These changes, of course, affected projected costs.

The foregoing resulted in a decision to revise the cost evaluation but not to change the proposed selection. However, after further consideration a question arose as to whether Rockwell could in fact operate all 25 stations even with the 2.5 manyear increase. It was suspected that Rockwell, based on knowledge obtained as incumbent, had concluded that the level of operation required under the contract would be substantially less than contemplated by the solicitation. EPA officials felt the questions raised called for further discussions with Rockwell; however, discussions with Rockwell would require discussions also with the other offeror in the competitive range, Xonics. Therefore, and since the projected utilization was revised, another round of best and finals was called for. The proposed award fee criteria were revised to more than double the weighting of the cost control criterion. The number and location of the aerosol instrumentation was also revised. In addition, areas of clarification in the respective proposals of each offeror were requested. A revised proposal due date was set for January 17, 1977.

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During the first 2 weeks of December 1976, EPA undertook special precautions to preserve the confidentiality of the respective proposals. Both firms were warned against improper contacts. Moreover, security measures were tightened for the evaluation of second best and final offers: a conference room was reserved for use in evaluating the proposals, and all copies of the proposals and revisions were collected and locked up.

To assist in the evaluators' understanding of the proposals, offerors were invited to explain orally their proposals during January 19 through January 20. After the second best and final offers had been evaluated, both offers were found to have sufficient, appropriately allocated manpower to operate the air monitoring system. Rockwell and Xonics were determined to have submitted technically acceptable offers, receiving 854 and 804 points respectively. However, Xonics' proposed cost was \$4,547,185 to Rockwell's \$4,654,039. A cost evaluation found that both proposals were closely estimated but neither was unrealistically low. It was then determined that only a slight technical superiority in favor of Rockwell did not outweigh the advantages to the Government of making award to Xonics on the basis of its lower-priced offer.

Subsequent to a protest filed by Rockwell with EPA in February 1977, EPA investigated charges of possible technical transferences of Rockwell's approach into Xonics' second best and final offer. The investigations considered an original list of 11, plus an additional 6 items, alleged by Rockwell to be unique to its proposal, to determine whether they in fact appeared in the Xonics offer. After all changes between original and revised proposals were evaluated with regard to either real or apparent deviations from Xonics' original proposal which might be construed as information obtained from the Rockwell proposal, no evidence of proposal compromise was discerned.

EPA also investigated a matter presented by cross affidavits from Rockwell and Xonics employees referring to a purported conversation between Rockwell and Xonics personnel in November 1976, from which Rockwell inferred that Xonics was privy to special information regarding the merits of the Rockwell proposal. On the basis of extensive interviews with the Xonics personnel named in Rockwell's affidavits, EPA states that it was unable to find any impropriety or evidence of access by Xonics personnel to the Rockwell proposal.

EPA states that it never informed Xonics of Rockwell's total proposed cost, or of any of the features of the Rockwell cost or technical proposal, nor was Xonics given an information as to the specifics of EPA's evaluation of any of Rockwell's proposals. Our review of the record fails to provide any evidence to conclude otherwise. The most that the record reveals is a concession by EPA that on December 8, 1976, having decided to select Rockwell for final negotiations, EPA informed Xonics of its decision and of the general basis for the decision--that Rockwell was selected on the basis of a superior technical proposal and lower proposed cost. EPA states that such a preliminary notice of selection is customarily given in accord with EPA policy.

In determining the ultimate effect, if any, of that information on the revised technical scores and proposed costs emanating from the second round of best and final offers, consideration must be given to certain factors which evidently had a significant bearing both on the decision to seek the additional round of offers and upon the technical and cost revisions that ensued.

As noted above, and prior to EPA's preliminary notification to Xonics on December 8, 1976 of the initial selection of Rockwell for final negotiations, the Contract Specialist was first advised on that date of a serious technical deficiency in the Rockwell proposal in that 7.5 manyears were considered inadequate to operate 20 fixed and 5 mobile stations. The record indicates that until that point, it was erroneously thought that Rockwell had proposed 7.5 manyears for the fixed stations and additional manyears for the mobiles. When this came to light, both the Rockwell and Xonics cost proposals were adjusted to reflect manyear costs on an equal basis, the result being that the gap between proposals was already narrowed by approximately \$1,000,000. When the manpower deficiencies in the Rockwell proposal were further explored on December 9, 1976, and an amount added to adequately operate the system at a level of 25 stations, the Rockwell cost became + \$50,000 of the Xonics proposal depending upon the method of estimating.

Moreover, EPA personnel began to suspect that Rockwell may have been utilizing special knowledge derived from its incumbency as the CHAMP contractor to estimate that the full 25 stations, upon which the RFP required offerors to submit proposal costs, would not actually be utilized. EPA then concluded that the referenced changes in the solicitation based on a more current assessment of likely range of station operation were essential not only to the receipt of more realistic cost estimates from the

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respective offerors, but also to negate any possible advantage based on inside information that Rockwell may have gained by way of its incumbency.

Finally, the record indicates that there was another deficiency in the Rockwell approach that was not discovered until January 19, 1977, the correction of which also led to another significant increase in the Rockwell cost proposal.

The contracting officer reports:

"It is understood that Rockwell planned to provide the bulk of the air monitoring stations operator support by hiring part-time personnel who are paid \$10 per station visit as is currently done on weekends and holidays. Neither the initial Rockwell technical proposal nor the first revisions explained this proposed method of operation which is a profound change to the current method of station support. Nor did the cost proposals provide sufficient detail to indicate such a change. Such an approach would be technically undesirable and, had the technical evaluation team been aware of the planned method of supporting the stations, the Rockwell technical evaluation score would have been lower. Had the part-time support of the stations been discovered only at final negotiations, the Contracting Officer would have had to halt the negotiations because it would have become evident the selection was based on a grave lack of understanding of the proposal and the procurement would have had to be resolicited. It was only at the January 19, 1977 discussion with Rockwell in which Rockwell's second best and final offer was being presented that the EPA learned of Rockwell's plan to use part-time help to provide the bulk of the station operation support."

As a result of Rockwell's apparent recognition of this deficiency, the contracting officer reports that Rockwell proposed full-time personnel for primary station operator support in its second best and final offer, limiting part-time help to holidays and weekends. The contracting officer reports that it was this change of approach by Rockwell more than any other item which caused the reversal of relative cost standings.

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In view of the foregoing, we believe the record provides a substantial basis upon which to conclude that the reversal in relative standing as to cost between Xonics and Rockwell was attributable primarily to the correction of the above-cited defect in the Rockwell proposal and to the fact that both offerors were offering more realistic projected agency requirements (as a result of the changes upon which second best and final offers were requested), rather than the mere knowledge by Xonics that Rockwell's initial best and final offer was lower priced.

The question of whether an auction has been conducted through the reopening of negotiations and submission of new best and final offers must be determined in the light of the particular circumstances of each case. See Bell Aerospace Company, 55 Comp. Gen. 244, 247 (1975), 75-2 CPD 168, and citations therein.

Having reviewed the changes made to the solicitation by EPA, we must conclude not only that they were made in good faith reasons (based on a more realistic assessment of actual usage) but that such changes would have a substantial effect upon prices previously submitted. In view thereof, we find that the reopening of negotiations was warranted in this instance. In this regard, once negotiations are properly reopened and new best and final offers requested, all offerors are free to revise their proposals, and we will not speculate on the reasons a particular offeror may choose to reduce its price. Bell Aerospace Company, supra.

In view of the foregoing, we cannot object to the second round of best and final offers. Nor do we find any basis in the record to support Rockwell's request for a third round of best and final offers. To the contrary, since both prices have been publicly revealed, such action would undeniably result in the very auction technique to which Rockwell objects.

With regard to Rockwell's contention that the Xonics proposal should have included, and EPA should have considered, an alleged \$645,775 in close-out and transition costs in replacing Rockwell with Xonics, we note that the RFP did not provide for the consideration of such costs in the evaluation of proposals. EPA states that it considered the costs of all tasks required of, and proposed by, Xonics and such costs were found reasonable. However, EPA contends, and we agree, that since the RFP did not specify a change-over cost factor to be assigned to all proposals other than the incumbent's, it would not have been proper to consider such costs.

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While the costs of phasing in a new contractor may be considered as an evaluation factor where desirable to do so, the solicitation should specify that such costs will be considered as an evaluation factor. Computer Data Systems, Inc., B-187892, June 2, 1977, 77-1 CPD 384; EG&G Incorporated, B-182566, April 10, 1975. 75-1 CPD 221.

Concerning the evaluation of Rockwell's past performance and management approach, the record shows that Rockwell received 195.6 of a possible 250 points for Criterion B, proposed technical and management organization, and 79.2 out of a possible 100 points for Criterion E, pertinent experience and past performance. Xonics received 209.2 and 82.5 points for these respective criteria. The contracting officer advises that he never stated that Rockwell was unacceptable in these areas, but only that there were some weaknesses in these areas. The evaluation scoring scheme shows that both Xonics and Rockwell had "some" weaknesses under the two subject criteria, and that Xonics' rating exceeded Rockwell's only by 13.4 points out of 250, and 3.3 points out of 100 respectively, suggesting that both offerors were considered virtually equal in these areas.

Rockwell charges that the statement of the contracting officer is at variance with a November 30, 1976 memo from the CHAMP Project Officer stating that the incumbent contractor (Rockwell) was proposing essentially the current management team, and past experience indicates they can effectively manage the CHAMP system. However, the record also contains a subsequent memo dated December 7, 1976, from the Chief, System Engineering Section, who, after reviewing technical responses to the questions presented in oral discussions, adjusted scores accordingly. He then scored Rockwell lower than in his initial ratings for various reasons, one being that while Rockwell had proposed a team of qualified scientists and engineers, very few of them were dedicated on a full-time basis. He felt this was inconsistent with good management practice. He concluded that notwithstanding the foregoing, both Rockwell and Xonics were "equally capable" of running the CHAMP system.

We have consistently held that procuring officials enjoy "a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award," and that such determinations are entitled to great weight and must not be disturbed unless shown to be unreasonable or in violation of the procurement statutes or regulations. METIS Corporation, 54 Comp. Gen. 612, 614-5 (1975), 75-1 CPD 44; Riggins and Williamson Machine Company, Incorporated, et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168; B-178220, December 10, 1973. The fact

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that the protester does not agree with that evaluation does not render the evaluation unreasonable. Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87; METIS Corporation, supra. In view thereof, and of the pertinent revelations of the record set out above, we have no basis to conclude that the fact that the Rockwell proposal was given 195.8 and 79.2 points under the subject criteria, rather than some other score, was unreasonable, an abuse of discretion, or at variance with narrative evaluation comments provided in the record.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States